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IN THE

# Supreme Court of the United States

GRETCHEN DYKSTRA, AS COMMISSIONER OF THE DEPARTMENT OF CONSUMER AFFAIRS OF THE CITY OF NEW YORK and THE CITY OF NEW YORK,

*Petitioners,*

*v.*

AUTOMOBILE CLUB OF NEW YORK,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Where this Court has held that in order to avoid preemption under 49 U.S.C. § 14501(c)(1), a state or municipal towing provision must be "genuinely responsive to safety concerns," and where this language has heretofore been unanimously construed by the Circuits to require a showing that the legislative intent in enacting the provision under review was a genuine response to safety concerns, rather than a pretextual device for enacting economically related legislation, did the Second Circuit err and create a split with the other Circuits by requiring an additional evidentiary showing that the provision under review is actually effective in protecting safety, a standard which imposes an unacceptable burden on states and municipalities seeking to enact safety-related towing provisions?

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## OPINIONS BELOW

The judgment of the Court of Appeals for the Second Circuit from which petitioners seek certiorari was decided March 24, 2008. In its opinion, the Second Circuit declared invalid the definition of "towing" contained in New York City Administrative Code § 20-495(d), and that enforcement of New York City tow licensing requirements against tow trucks passing through New York City or towing vehicles into New York City is preempted by 49 U.S.C. § 14501(c)(1). The opinion is reported at 520 F.3d 210 (2nd Cir. 2006), 2006 U.S. App. 6078, and appears in the Appendix at page 1a.

On March 24, 2006, the United States District Court for the Southern District of New York (Owen, U.S.D.J.) found for respondent. That opinion and order (one paper) is reported at 423 F Supp 2nd 279 (SDNY 2006) and 2006 U.S. Dist. LEXIS 13583. It appears in the Appendix at page 17a.

On November 3, 2006, the same Court awarded to respondent the amount of $651,856 in attorneys' fees, plus $6,293 in expenses. That opinion and order is reported at 2006 U.S. Dist. LEXIS 81414.

## JURISDICTION

The Second Circuit issued its decree on March 24, 2008 (1a).[1] This Court has jurisdiction to review this judgment under 28 U.S.C. § 1254.

## STATEMENT OF THE CASE

### A. Nature of Case

Respondent's complaint, dated April 5, 2004, sought a judgment declaring Title 20, Chapter 2, Subchapter 31 of the New York City Administrative Code (Administrative Code") "unlawful and invalid," and permanently enjoining the City from enforcing that statutory scheme (A28-37). The complaint was appended to an order to show cause seeking a temporary restraining order and a preliminary injunction (A26).

Respondent sought a permanent injunction barring enforcement of its tow licensing scheme on the following grounds (A34-36):

1) the City's licensing scheme is not a valid exercise of the City's "safety and regulatory authority" and is thus preempted by § 14501(c) of the FAA Authorization Act of 1994 and the ICC Termination Act of 1995 ("Title VI");

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[1] Parenthesized numbers *followed* by the lower case letter "a" refer to the pages of the Appendix of this Petition for a Writ of Certiorari. Parenthesized numbers *preceded* by the capital letter "A" refer to pages of the Joint Appendix filed in the Second Circuit.

2) "[t]he force and effect of the Licensing Scheme . . . is to regulate interstate commerce in violation of . . . the United States Constitution";

3) the Licensing Scheme "restricts the ability of plaintiff to provide services to members within the State of New York" and "is not necessary for the proper regulation of plaintiff's activities," thus violating N.Y. General Municipal Law, which bars the City from discriminating against non-residents.[2]

### B. Statement of Relevant Facts

The provisions of law challenged in plaintiff's complaint are codified in New York City Administrative Code §§ 20-495 through 20-528. These provisions include § 20-495(d), which states: "Towing shall mean the driving or other operation of a tow truck, or the offering to transport a vehicle by means of a tow truck." In the decision from which we petition for certiorari, the Second Circuit found the foregoing provision to be preempted by 28 U.S.C. § 14501(c)(1).

The challenged provisions were added by New York City Local Law 28 of 1987, which transferred administrative authority over vehicle towers from the New York City Police Department to the City's Department of Consumer Affairs and set forth a

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[2] The District Court did not rule on any ground relating to the N.Y General Municipal Law ("GML"). Nor did respondent assert any such ground in its appellee's papers submitted in the appeal below, and the Second Circuit had no occasion to consider the claim. Accordingly, the alleged violation of GML does not constitute a basis for affirming the decision below.

comprehensive new regulatory scheme regarding the towing of vehicles in New York City.

The clear and explicit intent of the New York City Council in promulgating Local Law 28 was to promote public safety. A statement of legislative intent issued by the City Council stated as follows (A2155):

> The council finds that the licensing and regulation of the towing industry continues to serve the purpose of protecting the public from over-reaching by certain members of the towing industry and from reckless conduct of certain such members which can threaten life and property.
>
> The council finds that it has been a persistent and widespread practice of tow truck operators to monitor police radio transmissions to learn of accidents and then race to accident sites with the intent of securing the towing and repair work. In so doing, speed limits and other traffic regulations are often violated, often posing a substantial threat to life and property. . . . *The council finds further that that in order to discourage tow operators from racing to an accident scene, it is necessary to prohibit such operators from soliciting at the accident scene and from maintaining in the course of their business radios capable of receiving police signals or messages.* [Emphasis added.]

The hazards of "chasing," *i.e.*, towers' practice of racing to an accident site to solicit business, were further described in a report submitted to the City Council in support of the legislation by the Mayor's legislative representative to the City Council, dated February 25, 1987, which stated (A2014):

> A primary objective of this legislation is to eliminate the practice endemic to the tow industry, of monitoring police radio transmissions in order to learn of accidents and then race to the scene to secure towing and repair work – a practice commonly known as "chasing." . . .
>
> The hazards and dangers of chasing are many. That chasing imperils both pedestrian and vehicular safety is clear: tow trucks racing to accident sites often exceed lawful speed limits and ignore traffic laws, behavior that all too often results in tragic injury to pedestrians and other motorists. There have even been innocent bystanders killed by reckless tow trucks chasing jobs. By the same token, the conditions that encourage chasing – namely, the currently lawful ability to monitor police radio transmissions and solicit work on-scene – also deprive consumers of adequate protections. Accident victims are often injured and under great stress; they are not well-equipped to evaluate in a critical way the quality of service offered by whichever tow company has happened to arrive at the scene first. The current system leaves room for

unscrupulous tow operators and owners to take advantage of a captive, often stranded audience.

The law was amended in 1993 (A2161) and 1994 (A2193) to enhance enforcement mechanisms and to better address the dangers of tow trucks chasing to accident scenes. The rules are designed to protect vulnerable stranded drivers from coercive or predatory conduct by tow drivers and operators. The law explicitly exempts from the licensing requirements certain enumerated towing services that are not offered to the general public, e.g., tows performed by governmental agencies, public utilities, vehicle dismantlers, bus and car service companies, and vehicle rental companies. Tow truck operators and the drivers employed by them must obtain licenses from the New York City Department of Consumer Affairs ("DCA") after meeting requirements addressed to safety and financial responsibility. Using fingerprints, DCA investigates the criminal histories of applicants, a majority of whom do have criminal records, and receives contemporaneous arrest reports for all applicants and licensees. Applicants to operate tow businesses must furnish proof of adequate liability insurance for both personal injury or death and property damage. Licensees must notify DCA as to the cancellation or modification of any required liability insurance policy. In order to ensure that operators are able to pay any consumer restitution awards or fines related to their towing services, they must furnish to DCA a $5,000 bond or make a $200 cash contribution to the Tow Truck Industry Trust Fund. DCA verifies that all applicants to be tow truck drivers have New York State tow driver's licenses in good

standing. DCA receives contemporaneous notification from New York State's Department of Motor Vehicles if a licensee's driving license is suspended or revoked at any time during the license period. Every tow truck must be in compliance with New York State registration and inspection requirements for their class of commercial vehicles. As a consumer protection measure, tow trucks are required to display certain identifying information, as well as their DCA medallion and the DCA complaint phone number, on the trucks themselves. The regulatory scheme further requires compliance with certain reporting and recordkeeping requirements designed to ensure licensee accountability.

In the course of considering the 1993 amendments, the New York City Council Committee on Consumer Affairs, after holding a hearing, found *inter alia*, in a report on Local Law 10 (A2164):

> 2. Consumers are not routinely provided with timely, accurate or necessary information regarding their rights when they attempt to retrieve their vehicle, and are subject to being "held up" for outrageous overcharges in order to obtain their vehicle.

The 1994 amendments included what was to become Administrative Code § 20-495(d), *i.e.*, the provision that defined "towing" as the driving of a tow truck unless that truck is otherwise exempt from the City's licensing scheme. That the express purpose of this amendment was to prevent "chasing" was made clear by the report by the New York City Council Committee on Consumer Affairs in support of Local Law 112, issued on December

21, 1993, following a hearing. The report stated in relevant part (A2189):

> Since its enactment in 1987, DARP [an accident management program] has been unable to eliminate the problem of "chasing" that continues to plague the streets of the city of New York. According to the Mayor's Memorandum in Support of this legislation, this problem involved the reckless and pervasive practice of many tow truck operators who learn of accidents by illegally monitoring police radio frequencies, and then race to accident scenes in disregard of speed limits and other traffic regulations in order to secure towing and repair work. Although under current law soliciting a tow or repair job at an accident scene is prohibited, if a tower can convince the person in charge of a vehicle to tell the police that he or she called the tower to the scene, these prohibitions can be circumvented. . . .
>
> The principal changes which Proposed Int. No. 602-A will make to existing law are as follows: . . . (3) the definition of towing will be broadened to encompass any use of a tow truck not covered by a specific exception. . . .

Similarly, a letter to the City Council by Frank T. New, the Mayor's Director of City Legislative Affairs, recommending "the earliest possible favorable consideration" of the amendment legislation, cited

"chasing" as the main hazard the amendments were designed to address. The memorandum stated (A2197):

> Section 20-495 is amended to more clearly define what towing activity is and what vehicles will be considered tow trucks. The result is to clarify what types of business and vehicles require licensing pursuant to Section 20-496 . . .
>
> * * * *
>
> The main goal of this bill is to end accident causing high speed "chasing" to accident scenes by tow truck drivers. In 1987, the Council enacted Local Law 28. The law created the Directed Accident Response Program (DARP). Those towers in the program rotate within a particular zone. Non-DARP towers have circumvented the system by the use of police radio frequencies and by soliciting tow jobs at the scenes of accidents. Because the non-DARP participants learn about the accidents as they happen, they are often the first ones at the accident scene. In order to be the first at the accident scene, it is most likely that the non-DARP tower has violated speed limits and various traffic regulations, thus posing a substantial threat to life and property. Meanwhile, the DARP tower is awaiting proper dispatch by the Police Department's DARP operator before it can attend to the accident scene. Unless there are injuries at the accident scene, a police car may

> not be able to show up at the accident scene for some time. By the time the police and/or the DARP tower appears, the non-DARP tower has illegally solicited the tow job and convinced the motorist to state that the tower was actually called by that motorist. This bill will end the dangerous practice of chasing, which leads to accidents.

Thus, the enactment of Administrative Code § 20-495(d) – "Towing shall mean the driving or other operation of a tow truck, or the offering to transport a vehicle by means of a tow truck" – was expressly directed at chasing as part of an overall scheme designed for the protection of life and property. It is one safety provision within a larger frame work designed to promote the safety of the towing consumer in many respects.

In 1999, a group of towers challenged the regulatory scheme as preempted by Title VI. Title VI generally prohibits state or municipal regulation of the "price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). However, one of the enumerated exceptions to this prohibition allows the local regulation of motor carrier transportation with respect to public safety and to insurance and financial responsibility requirements. 49 U.S.C. § 14501(c)(2)(A). Upon review of the entire regulatory scheme, both the District Court for the Southern District of New York and the Court of Appeals for the Second Circuit reviewed and upheld the City's tow regulations as not preempted by Title VI. *Ace Auto Body v. City of New York*, 1997 US Dist. LEXIS 16679 (SDNY 1997), *aff'd*, 171 F.3d 765, 775-76 (2d Cir.), *cert. denied*, 528 U.S. 868 (1999).

### C. Federal Jurisdiction of District Court

The District Court had jurisdiction of the original action herein pursuant to 28 U.S.C. § 1331.

### D. District Court's Opinion

Following a bench trial, the United States District Court for the Southern District of New York (Owen, U.S.D.J), by opinion and order (one paper) dated March 24, 2006, found in favor of the respondent (17a). In so doing, the District Court declared void Administrative Code § 20-495(d), which defines "towing" to include "the driving or other operation of a tow truck. . . ."[3]

The District Court held, *inter alia,* that the provision prohibiting "legitimate tow trucks from elsewhere from entering New York City to pick up a tow or deliver a tow or drive through New York City" is precluded by 49 U.S.C. § 14501(c)(1),[4] which generally preempts state and local regulation of intrastate and interstate towing. Although 49 U.S.C. § 14501(c)(2)(A) preserves from preemption "the safety regulatory authority of a state with respect to motor vehicles," as well as "the authority of a State to regulate motor carriers with regard to minimum amounts of financial

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[3] The District Court also indicated that it might find certain other provisions of Title 20, Chapter 2, Subchapter 31 of the Administrative Code to be unlawful (SA14). Nonetheless, the District Court made no subsequent ruling on any other aspect of the City's towing scheme.

[4] In an apparent error, the reported opinion gives the statute cited as 49 U.S.C. § 14501(a)(1).

responsibility relating to insurance requirements," the District Court found that in the absence of any statistical study showing concretely that the towing ordinances have had "any impact on the safety of consumers," the City had failed to overcome federal preemption (25a).

### E. The Opinion of the United States Court of Appeals for the Second Circuit

By opinion and order (one paper) dated March 24, 2008, the U.S. Court of Appeals for the Second Circuit affirmed the decision of the District Court, finding that the City's definition of "towing" in Administrative Code § 20-495(d) is preempted by 49 U.S.C. § 14501(c)(1). The Court held that "[e]nforcing the Scheme against tow trucks passing through New York City or towing vehicles into New York City does not respond to safety concerns and does not fall within the safety exception of 49 U.S.C. § 14501(c)(1)" (15a).

In reaching this outcome, the Second Circuit relied on its own prior decision in *Loyal Tire & Auto Center, Inc. v. Town of Woodbury*, 445 F.3d 136 ( 2nd Cir. 2006), the opinion in which the Second Circuit first construed this Court's holding in *City of Columbus v. Ours Garage and Wrecker Service*, 536 U.S. 424 (2002). The *Ours Garage* opinion stated that to avoid preemption under the public safety exception of 49 U.S.C. § 14501(c)(2)(A), a state or municipal law must be "genuinely responsive to safety concerns." 536 U.S. at 442. Like other courts, both federal and state, that have ruled under *Ours*

*Garage*,[5] the Second Circuit held in *Loyal Tire* that a showing of genuine responsiveness requires a demonstration of appropriate "legislative intent and purpose". 445 F.3d at 145. Unlike the other circuit courts that have considered this issue, however, the Second Circuit understood the phrase "genuinely responsive" to require a showing that the legislation in question is actually effective in protecting safety. *Id.* at 146 ("In addition to considering the expression of legislative intent in the statute itself and the legislative history, we must assess the three specific ways in which Woodbury argues that its 'one-mile' radius rule is genuinely responsive to safety concerns").

Following the guidelines set forth in *Loyal Tire*, the Second Circuit, in the instant case, first considered the legislative intent underlying the promulgation of Administrative Law § 20-495(d). The court readily acknowledged the safety objectives that prompted the enactment of the City's overall regulatory scheme governing towing, particularly the intention to eliminate "chasing." The Second Circuit stated (10a):

> The record indicates that the Scheme was enacted to prevent chasing. The Office of the Mayor noted that the "primary objective" of

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[5] *See Tillison v. Gregoire*, 424 F3d 1093 9th Cir. 2005); *Tillison v. City of San Diego*, 406 F3d 1126 (9th Cir. 2005); *Galactic Towing, Inc. v. City of Miami Beach*, 341 F3d 1249 (11th Cir. 2003); *Tow Operators Working to Protect Their Right to Operate on the Streets of Kansas City v. City of Kansas City, Missouri*, 338 F3d 873 (8th Cir. 2003); *Cole v. City of Dallas*, 314 F3d 730 (5th Cir. 2002); *Fife Enterprises v. Washington State Patrol*, 113 Wn. App. 1011 (Wash. App. 2002).

> Local Law 87-28 "is to eliminate the practice, endemic to the tow industry, of monitoring police radio transmissions in order to learn of accidents and then race to the scene to secure towing and repair work – a practice known as 'chasing.'" . . . Chasing "imperils both pedestrian and vehicular safety" and "too often results in tragic injury to pedestrians and other motorists." *Id.* The City Council's declaration of legislative intent concurred, noting that the "reckless conduct" inherent in chasing "can threaten life and property." Moreover, the law authorized DCA to refuse to renew, suspend or revoke a towing license where the driver operated a truck in a "grossly negligent manner," made a material false statement on an application, engaged in fraud, failed to pay a fine, was convicted of a crime having a "direct relationship to the ability to perform licensed activities," or engaged in conduct that would "endanger the public." *Id.*

With regard to the enactment of Administrative Code § 20-495(d), however, the Second Circuit acknowledges the express objective of the provision only to the extent of quoting the statement of Frank T. New, the Mayor's Director of City Legislative Affairs, that the purpose of the provision was to "fill[] existing loopholes that undermined the DARP program" (A2199). Curiously, the Second Circuit avoided noting that purpose of the proposed 1994 amendments, which

included the provision that became § 20-495(d), was stated in the same report, under the heading "REASONS FOR SUPPORT," as follows: "The main goal of this bill is to end accident causing high speed 'chasing' to accident scenes by tow truck drivers" (A2199).

The Second Circuit proceeded to state (11a-12a):

> Although the record is replete with evidence that the City sought to curb a public safety risk by carefully regulating tow trucks engaged in chasing, the legislative history does nothing to explain whether the City Council intended to subject all tow trucks passing through the City to its Scheme or why such broad regulation was necessary. The City may have been motivated by a desire to reduce chasing within New York City in broadening the definition of "towing," but it did not explain why increased enforcement was insufficient.

The Second Circuit's uncertainty as to "whether the City Council intended to subject all tow trucks passing through the City to its Scheme" is puzzling. There is no ambiguity in the language of 20-495(d) providing that "[t]owing shall mean the driving or other operation of a tow truck, or the offering to transport a vehicle by means of a tow truck." The Second Circuit opinion nowhere suggests what this language could possibly mean other than that all tow trucks being driven within City limits are subject to the City's regulatory scheme, including the licensing requirements applicable to all towers.

As to the Second Circuit's observation that the City Council failed to demonstrate why § 20-495(d) was necessary for preventing chasing, that concern goes not to whether the City Council was "genuinely responsive" to the dangers posed by chasing, but rather whether the form that such responsiveness took was effective in achieving its purpose. In this respect, the Second Circuit, as already noted, adopted a far more expansive approach to the holding of *Ours Garage* than had previously been adopted by any other circuit court, placing unprecedented obstacles in the path of any municipality that wishes to enact safety legislation related to towing. The Second Circuit deemed as dispositive its perception that "the City has not presented any evidence to support [the contention that its towing regulations have improved public safety], relying exclusively on the Scheme's legislative history to demonstrate that the City Council and the Mayor were motivated by a desire to make New York City safer. As noted by the district court, the City has never assessed the effectiveness of the Scheme in fighting chasing. Multiple amendments so soon after it enactment suggest that it was not strongly effective . . ." (13a).

Based on these considerations, the Second Circuit affirmed the judgment of the District Court, invalidating the City's definition of towing under Administrative Code § 20-495(d), and prohibiting regulatory enforcement against tow trucks passing through the City or towing vehicles into the City, as preempted by 49 U.S.C. § 14501(c)(1).

## REASONS FOR GRANTING THE PETITION

The Second Circuit's decision holds that in the absence of an evidentiary demonstration of effectiveness, Administrative Code § 20-495(d), as well as any enforcement conducted pursuant to that provision against tow trucks passing through the City or towing vehicles into the City, cannot be deemed "genuinely responsive" to the hazards of chasing or to other safety concerns. None of the other Circuits that have considered whether particular state or municipal towing regulation were preempted by 49 U.S.C. § 14501(c)(1) have required as prerequisite for escaping preemption a showing of the contested law's actual efficacy in protecting safety. The other Circuits have instead looked to whether the record evidence indicated any non-safety-related motive, particularly any economic motive, for the contested law. In the decision below, the Second Circuit cited no record evidence that the safety-directed objective of § 20-495, and of the enforcement practices deemed to be preempted, was actually a pretext for legislation designed for the City's economic benefit, or for any purpose other than the protection of public safety.

As a result, the Second Circuit's decision stands in stark conflict with the unanimous approach of the other Circuits. Moreover, as will be shown, the decision, if universally applied, would place in jeopardy virtually all safety-related regulation governing towing.

The decision of this Court in which the Second Circuit purports to find authority for its preemption finding is *City of Columbus v. Ours Garage*, 536 U.S.

424 (2002). In *Ours Garage*, this Court opined that "Congress' clear purpose in [49 U.S.C.] § 14501(c)(2)(A) is to ensure [] its preemption of States' economic authority over motor carriers of property, § 14501(c)(1), 'not restrict' the preexisting and traditional state power over safety." *Id.* at 439. Expanding on the importance of preserving the right of states and municipalities to regulate the safety aspects of towing, as distinct from the preempted authority to regulate the economic aspects of the towing industry, this Court stated further, *id.* at 440:

> [Congress's] declarations of deregulatory purpose, however, do not justify interpreting through a deregulatory prism "aspects of the State regulatory process" that Congress determined should *not* be preempted. [Emphasis in original.]
>
> *A congressional decision to enact both a general policy that furthers a particular goal and a specific exception that might tend against that goal does not necessarily call for the narrowest possible construction of the exception.* [Emphasis added.] Such a construction is surely resistible here, for § 14501(c)(1)'s preemption rule and 14501(c)(2)(A)'s safety exception to it do not necessarily conflict. The problem to which the congressional conferees attended was "state *economic* regulation"; the exemption in question is for state *safety* regulation. . . . [Emphasis in original].

Consistent with this analysis, this Court concluded that "[l]ocal regulation of prices, routes, or services of tow trucks that is not genuinely responsive to safety concerns garners no exemption from § 14501(c)(1)'s preemption rule." *Id.* at 441.

Guided by the precepts stated in *Ours Garage*, circuit courts other than the Second Circuit have unanimously affirmed the validity of every towing law for which they reviewed a preemption challenge. *See VRC LLC v. City of Dallas*, 460 F.3d 607 (5th Cir. 2006); *Tillison v. Gregoire*, 424 F.3d 1093 (9th Cir. 2005); *Tillison v. City of San Diego*, 406 F.3d 1126 (9th Cir. 2005); *Galactic Towing, Inc. v. City of Miami Beach*, 341 F.3d 1249 (11th Cir. 2003); *Tow Operators Working to Protect Their Right to Operate on the Streets of Kansas City v. City of Kansas City, Missouri*, 338 F.3d 873 (8th Cir. 2003); *Cole v. City of Dallas*, 314 F.3d 730 (5th Cir. 2002). The Second Circuit broke this pattern when, in *Loyal Tire & Auto Center, Inc. v. Town of Woodbury*, 445 F.3d 136 (2nd Cir. 2006), it became the only circuit court to interpret *Ours Garage* as requiring not only a consideration of the "the expression of legislative intent in the statute itself and the legislative history," 445 F.3d at 146, but an assessment of whether the challenged provision is "genuinely safety-*related*" [emphasis added]. *Id.* at 147. The same criteria dictated the Second Circuit's determination in the instant case.

The transformation of the relevant test from that stated in *Ours Garage*, *i.e.*, whether the challenged provision is "genuinely responsive to safety concerns," to whether the provision is "genuinely safety-related" is subtle but significant. The "genuinely responsive"

standard goes to whether the law at issue resulted from the legislature's good faith intention to address a public safety concern rather than simply to engage in economic control. The "genuinely safety-related" standard, at least as applied by the Second Circuit, entails an assessment of the law's efficacy as a safety measure. Looking to its precedent in *Loyal Tire*, the Second Circuit applied that test in the instant case. Crucial to the Second Circuit's decision in this case was its emphasis on the lack of evidence related to effectiveness: "As noted by the district court, the City has never *assessed the effectiveness* of the Scheme in fighting chasing" [emphasis added] (13a).

It is unlikely that any of the laws considered by the other circuit courts would have withstood preemption had those courts applied the criteria of the Second Circuit. The first decision by a circuit court applying the preemption criteria stated in *Ours Garage* was the Fifth Circuit's opinion in *Cole v. City of Dallas*, 314 F.3d 730 (5th Cir. 2002). The Fifth Circuit upheld as exempt from preemption a body of regulation related to the criminal histories of tow truck operators in Dallas. These regulations were enacted pursuant to an ordinance stating that, *id.* at 735:

> The city council believes that the proposed safety-related regulations for non-consensual tows would promote the public safety of both visitors and residents of the city of Dallas by contributing to a decrease in the potential for confrontation and violence between vehicle owners and the persons who tow their vehicles: a decrease in bodily injury and

> property damage caused by faulty tow truck vehicles and equipment or by incompetent, negligent and criminal actions of tow truck operators and drivers.

This statement is indistinguishable in significance from language in the report of the New York City Council's Committee on Consumer Affairs recommending adoption of the 1994 amendments including the provision that became Administrative Law § 20-495(d). As the rationale for its support, the Committee noted that the City's Directed Accident Response Program ("DARP") had thus far "been unable to eliminate the problem of 'chasing' that continues to plague the streets of the City of New York" (A2189). The safety purpose underlying the amendments is further made manifest by Memorandum in Support submitted to the City Council by the Mayor's Director of Legislative Affairs, Frank T. New. That memorandum asserts that "[t]he legislation fills existing loopholes which have served to undermine the DARP program" (A2199). It further states categorically: "The main goal of this bill is to end accident causing high speed 'chasing' to accident scenes by tow truck drivers. . . . This bill will end the dangerous practice of chasing, which leads to accidents."

Based on documentation comparable to that deemed insufficient in the instant case, the Fifth Circuit stated in *Cole*: "That the criminal history regulation has, at its core, concern for safety is manifest." 314 F.3d at 735. The court noted, moreover, that the plaintiff tower "has raised no argument pointing to some hidden pretextual economic goal behind the provision." *Id.* The same is

true in the instant case. By contrast to the Second Circuit, however, the Fifth Circuit conducted no inquiry into the efficacy of the regulatory scheme under consideration. As a result, the *Cole* decision is based on a record that would have been deemed by the Second Circuit insufficient to avoid preemption.

Similarly, in a subsequent case, the Fifth Circuit again found a Dallas towing ordinance to be exempt from preemption. *VRC LLC v. City of Dallas*, 460 F.3d 607 (5th Cir. 2006). "The challenged ordinance . . . require[d] that signs warning of the threat of towing be posted on private property when, and for twenty-four hours before, a vehicle is towed without the vehicle owner's consent." *Id.* at 608-09. Based on "evidence show[ing] that the Dallas City Council considered the possibility of violent confrontation between unwarned vehicle owners and tow truck drivers a safety issue and found that a requirement that signs be placed and maintained would help remedy the problem," the Fifth Circuit inferred a legislative intent genuinely responsive to safety concerns. *Id.* at 615. While the Fifth Circuit decision took note that "a city administrator testified from his experience that there was a real problem with confrontation between citizens and tow truck drivers, and that the signs had been helpful," such testimony is not, in itself, anything more than conclusory. *Id.* It provides no more evidence of actual effectiveness in protecting public safety than was present in the instant case.

In addition, the Fifth Circuit speculated that "the signs could prevent drivers from parking where they were at risk of being towed, help to defuse the

anger of some who were actually towed, and as the city administrator testified and the ordinance preamble noted, reduce the drain on police resources caused by false stolen car reports." *Id.* Such considerations have no more evidentiary basis than the common-sense conclusion to be drawn in the instant case that prohibiting the unlicensed driving of a tow truck within New York City will serve as a deterrent against towers who would come into the City intending to engage in chasing. None of the evidence considered by the Fifth Circuit in *VRC LLC* is the basis for a concrete assessment of efficacy in protecting safety. That the Second Circuit declined to exempt the City from preemption based on evidence no more speculative than that before the Fifth Circuit reflects a split between the two Circuits.

In *Galactic Towing, Inc. v. City of Miami Beach*, 341 F.3d 1249 (11th Cir.2003), the Eleventh Circuit reviewed a preemption challenge to a municipal ordinance imposing various permit requirements on towing businesses. In determining that the ordinance escapes preemption, the Eleventh Circuit focused primarily on legislative intent as reflected in the text of the ordinance itself, as follows: "The city commission finds and determines that that the unauthorized parking of vehicles that cannot be removed constitutes a public nuisance and public emergency effecting [sic] the property, public safety and welfare of the citizens and residents of the city." *Id.* at 1253. The Fifth Circuit found this entirely conclusory language to be satisfactory proof that the intent of the Miami legislative body was to address safety concerns. This language is no more informative as to the actual effectiveness of the

ordinance in maintaining safety than is the statement by the New York City Council's Committee on Consumer Affairs indicating that the revised definition of towing, among other provisions, was intended to address the dangers of chasing.

Moreover, the Eleventh Circuit noted that "the City offered affidavits from two City officials . . . containing relevant information on how the challenged sections of the City's towing ordinance affect *safety concerns*" (emphasis in original). *Id.* The Fifth Circuit's italicized use of the phrase "safety concerns" rather than merely "safety," reflects a focus on the legislative body's intention, *i.e.*, its "concerns," rather than on whether safety is effectively achieved, which is outside the scope of the court's inquiry. Administrative Code § 20-495(d), which has the effect of limiting the operation and driving of a tow truck within New York City to individuals who have undergone the screening for suitability that is part of the licensing process, likewise has an obvious connection with the City Council's "concerns" that chasing be controlled. But unlike the Eleventh Circuit, the Second Department insisted on a showing of "effectiveness." The divergent outcomes in *Galactic Towing* and the instant case again reflects a split in the Circuits.

The Second Circuit likewise splits with the Eight Circuit's decision in *Tow Operators Working to Protect Their Right to Operate on the Streets of Kansas City v. City of Kansas City, Missouri*, 338 F.3d 873 (8th Cir. 2003). In that case, the challenged ordinance rendered it "unlawful for the owner or operator to . . . stop or proceed to the scene of an accident unless called to the

scene, requested to stop, or flagged down by the owner or operator of a vehicle involved in an accident or requested to perform the service by a law enforcement officer. . . ." *Id.* Noting the invocation in *Ours Garage* of the presumption against federal preemption of state police powers, 536 U.S. at 432-33, the Eighth Circuit accepted the municipality's "facially plausible[], assertion of a genuine safety purpose." The responsiveness to safety concerns found by the Eighth Circuit was no more "facially plausible" than New York City's contention in the instant case that limiting the driving of tow trucks within city limits to operators whose criminal history has been reviewed and who can be subject to having their towing license removed by DCA deters towers from engaging in chasing.

Like the Fifth Circuit, the Ninth Circuit has twice upheld challenged towing provisions as being exempt from preemption. The California state statute under review in *Tillison v. City of San Francisco*, 406 F.3d 1126 (9th Cir. 2005), "provides that when a towing company tows a vehicle from private property without the vehicle owner's permission, the company must obtain written authorization from either the property owner or the property owner's agent," and further "requires that the property owner or agent be present for the tow." *Id.* at 1127. The Ninth Circuit found that intent responsive to safety concerns, as opposed to economic concerns, could be gleaned from conclusory legislative language simply stating that the procedures mandated by the law would "further the safety of the public." *Id.* at 1129-30. Although the court looked favorably on speculation by the District Court as to how the provision was "safety-related," nothing considered by the District

Court consisted of concrete evidence of the law's effectiveness. *Id.* at 730-31. What primarily guided the Ninth Circuit was the principle that "the focus of the safety exception to preemption must be on the legislative intent and whether the legislature was acting out of safety concerns." *Id.* at 1129. Critically, in contrast to the Second Circuit, the Ninth Circuit was in no way deterred by the absence of any concrete evidence that the law was actually effective in protecting safety.

Shortly after the prior decision, the Ninth Circuit upheld, as responsive to safety concerns, another towing law challenged by the same plaintiff. *Tillison v. Gregoire*, 424 F.3d 1093 (9th Cir. 2005). The challenged law prohibits towers from towing vehicles illegally parked on private property unless the tower has a written authorization signed either by the property owner or by the public official requesting the tow. *Id.* at 1096-97. As in its earlier review of a challenge to a towing law, the Ninth Circuit focused on whether the state legislature had public safety in mind when enacting the provision, not whether the provision was actually effective. Based on the same legislative language ruled dispositive in the prior *Tillison* case, the Ninth Circuit again upheld the challenged towing provision as exempt from preemption.

The standard for exemption from preemption that is now the rule in the Second Circuit – as distinct from the standard applied by the Fifth, Eighth, Ninth, and Eleventh Circuits – will, if carried to its logical conclusion, render unenforceable virtually any safety-related towing ordinance that comes up for review. Once a municipality is required to demonstrate the actual effectiveness of a

law in order to evade preemption, there is nothing to prevent a preemption challenge after a provision has been enacted but before the municipality has had the opportunity to accumulate a record of enforcement sufficient to show safety-related results.

Moreover, by the Second Circuit's criteria, any legislative effort to enhance the effectiveness of a safety-related statutory scheme by amending it is deemed proof that the amendment itself is ineffective. Referring to the regulatory towing scheme enacted in 1987, the Second Circuit states: "Multiple amendments [including § 20-495(d)] so soon after its enactment suggest that it was not strongly effective" (13a). Whereas an attempt to correct deficiencies in a safety ordinance would seem, by definition, to be "genuinely responsive" to safety concerns, the Second Circuit paradoxically finds in that very attempt a basis for preemption. By employing a "genuinely safety-related" standard in this fashion, the Second Circuit has improperly stretched its analytical framework beyond the relevant issue of whether the conception of the law is constitutionally sound to an evidentiary consideration of whether the law has fulfilled its legislative intention.

We understand this Court to have chosen its words purposefully when, in *Ours Garage*, it defined the relevant standard as whether a towing provision is "genuinely responsive to safety concerns." It does not appear to have been an accident that this Court did not instead use the words "genuinely effective in addressing safety concerns." Through its careful choice of words, this Court crafted an opinion consistent with its well-entrenched holding that "where the legislative judgment

is drawn into question, [the inquiry] must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for [the legislation]." *U.S. v. Carolene Products*, 304 U.S. 144, 154 (1938). By failing to give due deference to this fundamental principle, the Second Circuit has distorted the meaning of *Ours Garage* and imposed a dangerously onerous and unworkable burden upon municipalities seeking to exempt from preemption safety-related towing provisions.

Finally, we recognize that the Second Circuit did not reach the issue of whether the City's towing scheme violates the Constitution's Commerce Clause. Respondent lacks standing to raise that issue and it is not properly part of this case. Since both respondent and its affiliated towers reside and perform tows within New York State, in which state New York City is also located, plaintiff does not have standing to raise a broad interstate commerce challenge on behalf of residents of other states who might wish to challenge the City's tow regulations as obstructing interstate commerce. Pursuant to the Supreme Court's three-pronged analysis for determining whether an entity has standing to assert claims in a representational capacity, plaintiff's representational standing is circumscribed to encompass the claims of towers who affiliate with plaintiff in order to perform consumer tows in the greater New York metropolitan area, including New York City, Long Island, Westchester, and the lower Hudson Valley. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

Hypothetical or ideological concerns for towers who are not within plaintiff's network do not constitute a basis for standing. *Kessler Inst. for Rehab. v. Mayor and Council of Borough of Essex Fells*, 876 F Supp 641, 653 (D. NJ 1995), citing *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972). This Court cannot rule against the City's tow regulations on the basis of hypotheticals advanced by plaintiff regarding the supposed plight of towers who are, by definition, not plaintiff's affiliates and therefore not before the Court. The towers actually represented by plaintiff before this Court are towers who actively, intentionally, and foreseeably seek towing work through plaintiff in its territory, the greater metropolitan area, which lies entirely within New York State and includes New York City. By their own description of the services they provide, they do not perform tows that begin in other states and end in New York City.

Accordingly, in reviewing this petition for certiorari, this Court should not deem respondent's Commerce Clause claim as a legitimate alternate ground for finding in respondent's favor.

## CONCLUSION

For the reasons set forth, the City respectfully asks this Court to grant its petition for a writ of certiorari.

Respectfully submitted,

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# APPENDIX

# APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED MARCH 24, 2008

## UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2007

(Argued: March 6, 2008 Decided: March 24, 2008)

Docket Nos. 06-1872-cv (L), 06-5243-cv (con)

AUTOMOBILE CLUB OF NEW YORK, INC.,

*Plaintiff-Appellee,*

—v.—

GRETCHEN DYKSTRA, as commissioner of the Department of Consumer Affairs of the City of New York and CITY OF NEW YORK,

*Defendants-Appellants.*

Before:

MCLAUGHLIN AND WESLEY, *Circuit Judges*, and COGAN, *District Judge.**

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* The Honorable Brian M. Cogan, United States District Court for the Eastern District of New York, sitting by designation.

*Appendix A*

PER CURIAM:

Appellants Dykstra and the City of New York (collectively, the "City"), appeal from orders of the United States District Court for the Southern District of New York (Owen, *J.*) permanently enjoining the City from enforcing its tow truck licensing Scheme, codified at Title 20, Chapter 2, Subchapter 31 of the Administrative Code of the City of New York (the "Scheme"), against tow operators from outside of New York City, declaring invalid § 20-495(d) of the Administrative Code, and awarding Appellee $651,856 in attorneys' fees and $6,293.98 in expenses. We affirm, holding that the enforcement of the City's licensing Scheme against out-of-City tow truck operators is preempted by 49 U.S.C. § 14501(c)(1) and that the district court was within its discretion in its award of attorneys' fees and expenses. Because we find that the City's extraterritorial application of the Scheme is preempted we need not reach the constitutional issues raised by the parties.

## BACKGROUND

Appellee Automobile Club of New York ("AAA") is a not-for-profit corporation which provides roadside assistance and towing in the New York metropolitan area[1] through a network of affiliated contractors. *Auto.*

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1. AAA's territory encompasses the five boroughs of New York City, Long Island and the seven counties of the lower Hudson Valley.

*Club of N.Y., Inc. v. Dykstra* ("*Auto. Club I*"), 326 F.Supp.2d 568, 569 (S.D.N.Y.2004). It brought this action challenging the City's Scheme as applied to tow trucks from outside New York City.

1. *The Scheme*

Originally enacted in 1987 and amended in 1993 and 1994, the Scheme comprehensively regulates the City's towing industry. The Scheme was enacted in large part to prevent tow truck drivers from monitoring police radios and "chasing" each other to reach the scene of a car accident first. *See* Memorandum in Support from the Office of the Mayor, Martha K. Hirst, Legislative Representative to the City Council (Feb. 25, 1987); Memorandum from Jeremy Travis, Special Counsel and Assistant Director, Office of the Mayor, Office of Operations (Dec. 8, 1986).

The Scheme makes it unlawful to "engage in towing without having first obtained a license" and authorizes the seizure of any tow truck being operated without a license. N.Y.C. Admin. Code §§ 20-496, 20-522.1. The Scheme defines "towing" to include not only the towing of a vehicle, but any "driving or other operation of a tow truck, or the offering to transport a vehicle by means of a tow truck." *Id.* § 20-495(d). Thus, as a whole, the Scheme requires that all tow trucks within the City limits must be licensed by the City or risk seizure. This is true regardless of whether the truck has a vehicle in tow and regardless of whether the truck is actively soliciting business in the City or simply passing through, such as towing a car from New Jersey to Long Island.

To obtain a license, a towing business must pay fees of $600 per truck and $20 per driver, as well as an additional fee for a fingerprint report and criminal record check. *Id.* § 20-497; Rules of the City of N.Y. § 2-364. Further, applicants must furnish proof of adequate liability insurance and either a $5,000 bond or a $200 cash contribution to the Tow Truck Industry Trust Fund. N.Y.C. Admin. Code § 20-499; Rules of the City of N.Y. § 2-375. Each tow truck is obligated to comply with New York state registration and inspection requirements. To reduce some of the economic incentives to "chase," the Scheme also established the Directed Accident Response Program ("DARP"), which requires that all vehicles disabled within the City be removed by licensed towers assigned on a rotating basis and bans the solicitation of disabled vehicles by unassigned towers. *See* N.Y.C. Admin. Code § 20-518.

2. *Enforcement of the Scheme*

Although the text of the Scheme authorized the seizure of all unlicensed tow trucks anywhere within New York City, an informal reciprocity agreement between the City and surrounding municipalities and counties minimized enforcement of the Scheme against non-City tow operators from 1987 until 2004. This agreement is evidenced by several writings. First, an April 4, 1990 memorandum authored by then-Assistant Commissioner of the Department of Consumer Affairs ("DCA") Peter Lempin served to:

> [R]einforce the towing reciprocity agreement the Department has with both the Tow

*Appendix A*

> Advisory Board and the different representative associations, regarding who requires a towing license.
>
> The intent of the agreement was not to penalize those companies, who for the most part, just pass through the city or occasionally tow vehicles from the city to bordering counties or states.

*Auto. Club I*, 326 F.Supp.2d at 569-70.

On January 13, 1993, Lempin, now DCA's First Assistant Commissioner, wrote to the Supervisor of Licensing for the Town of Hempstead that:

> Since 1987, when the Department of Consumer Affairs assumed the licensing and regulatory authority over towing businesses, we have honored an informal licensing reciprocity policy with surrounding counties. This policy allows towing firms from Nassau, Suffolk and Westchester counties to pass through New York City without having to obtain a City license.

*Id.* at 570. The following year, Lempin, by then DCA Deputy Commissioner, wrote a nearly identical letter to the Deputy Mayor for Operations of the City of Yonkers. *Id.*

By 2000, the informal reciprocity agreement had become documented in the Patrol Guide issued by the New York Police Department titled "Seizure of Unlicensed Tow Trucks." According to the NYPD, "tow trucks from outside New York City that are passing through or merely picking up or dropping off a vehicle within New York City are not subject to this [seizure] procedure." *Id.* The same or similar language was also included in the Patrol Guide dated November 30, 2001 and a May 19, 2004 NYPD Operations Order. *Id.*

Regardless of the scope of the reciprocity, enforcement increased dramatically in 2004, when only 25% of tow operators met their license renewal deadlines. Consequently, as of January 1, 2004, DCA began conducting sweeps and seized approximately 60 tow trucks, 19% of which belonged to towers outside of the City. In 2003, AAA performed approximately 14,000 interstate tows, while in 2004, towing clubs in the New York area performed approximately 6,000 tows to, from, or across the City limits. *Auto. Club of N.Y., Inc. v. Dykstra* ("*Auto. Club II*"), 423 F.Supp.2d 279, 281 (S.D.N.Y.2006). To avoid seizure of these trucks, AAA created a "handoff" system whereby vehicles were towed to the City limits and then swapped onto licensed tow trucks. *See Auto. Club I*, 326 F.Supp.2d at 572. According to AAA, these measures were necessary because its members did not have a sufficient number of licensed trucks to perform all tows into, out of, or through New York City.

AAA filed this action on April 5, 2004, seeking a judgment enjoining the City from enforcing the Scheme. In July 2004, the district court ordered the continuation of the reciprocity policy, and preliminarily enjoined the City from enforcing the Scheme against non-City tow trucks authorized by their own municipalities and in accordance with New York state law. *Id.* at 573. Following a full trial, the district court invalidated portions of the Scheme and specifically declared its definition of "towing" void. *Auto. Club II*, 423 F.Supp.2d at 287-88. The court found three independent bases for this decision. First, under 49 U.S.C. § 14501(c)(1), the Scheme was preempted as "a law, regulation, or other provision . . . related to a price, route, or service of any motor carrier" not saved by the provision's safety exception to preemption. *See* 49 U.S.C. § 14501(c); *Auto. Club II*, 423 F.Supp.2d at 285. Second, the Scheme unduly burdened interstate commerce in violation of the dormant Commerce Clause by "essentially imposing . . . a high toll on towers." *Id.* at 282. Because it requires a license simply to drive a tow truck within the City limits, the Scheme would force, for example, "a New Jersey tower, wanting to tow from Newark to . . . Long Island . . . to go north of Yonkers on the west (opposite) side of the Hudson River to the Tappan Zee Bridge, work across Westchester to Bridgeport, Connecticut to the Long Island Sound Ferry and then on Long Island go back west to Mineola." *Id.* (emphasis and footnote omitted). Third, the broad definition of towing authorized seizures of trucks without the probable cause required by the Fourth and Fourteenth Amendments. *Id.* at 286. Lastly, in a separate decision,

the district court awarded AAA $651,856 in attorneys' fees plus $6,293.98 in expenses. *Auto. Club of N.Y., Inc. v. Dykstra*, No. 04 Civ. 02576, 2006 WL 3208585, at *2, 2006 U.S. Dist. LEXIS 81414, at *7 (S.D.N.Y. Nov. 6, 2006).

## DISCUSSION

### I

In 1994, Congress passed the Federal Aviation Administration Authorization Act of 1994 (the "FAAA Act"), which became codified as part of the Interstate Commerce Act. In relevant part, the FAAA Act amended the Interstate Commerce Act to preempt state regulation of certain aspects of motor carriers, including tow trucks. Specifically, the Act preempts the laws of a "State [or] political subdivision of a State . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property."[2] 49 U.S.C. § 14501(c)(1). As an exception to this general preemption rule, Congress provided that the Act "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." *Id.* § 14501(c)(2)(A).

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2. The City argues that the Scheme is outside the scope of the FAAA Act altogether. However, in doing so, it cites to *Ace Auto Body*, a case applying the safety exception. *See Ace Auto Body & Towing, Ltd. v. City of N.Y.*, 171 F.3d 765, 771 (2d Cir.1999). We think that the Scheme is plainly within the scope of the FAAA Act, as the mere fact that any tow truck entering New York City would be subject to seizure if unlicensed clearly relates to "route," if not "price" and "service" as well. *See* 49 U.S.C. § 14501(c)(1).

We have previously upheld portions of the Scheme in the face of an FAAA Act challenge, holding that the safety exception applies to provisions "reasonably related" to safety. *See Ace Auto Body & Towing, Ltd. v. City of N. Y.*, 171 F.3d 765, 777 (2d Cir.1999). After our decision in *Ace Auto Body*, the Supreme Court ruled that the safety exception to preemption only applies to local regulations "genuinely responsive to safety concerns." *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 442, 122 S.Ct. 2226, 153 L.Ed.2d 430 (2002). Applying the *Ours Garage* standard, this Court limited the ongoing significance of *Ace Auto Body*.[3] *See Loyal Tire & Auto Center, Inc. v. Town of Woodbury*, 445 F.3d 136, 145 (2d Cir.2006). "Following *Ours Garage*, we no longer consider simply whether a regulation is reasonably related to safety but must determine whether, in light of the legislative body's purpose and intent, the regulation is 'genuinely responsive' to safety concerns." *Id.* Making that determination requires two steps. First, a court "must consider any specific expressions of legislative intent in the statute itself as well as the legislative history." *Id.* Then, it must assess those "purported safety justifications . . . in light of the existing record evidence." *Id.* The Scheme fails both steps.

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3. The court also called into question the continued validity of *Ace Auto Body*'s holding regarding the Scheme, stating that "Nothing in *Ace Auto Body* controls the resolution of this case . . . [and] whether or not [Woodbury's towing] law is reasonably related to safety, it is not genuinely response to safety concerns." *Loyal Tire & Auto Center, Inc. v. Town of Woodbury*, 445 F.3d 136, 148 n. 6 (2d Cir.2006).

*Appendix A*

1. *Legislative Intent*

The record indicates that the Scheme was enacted in large part to prevent chasing. The Office of the Mayor noted that the "primary objective" of Local Law 87-28 "is to eliminate the practice, endemic to the tow industry, of monitoring police radio transmissions in order to learn of accidents and then to race to the scene to secure towing and repair work-a practice commonly known as 'chasing.' " Hirst Memorandum, *supra.* Chasing "imperils both pedestrian and vehicular safety" and "too often results in tragic injury to pedestrians and other motorists." *Id.* The City Council's declaration of legislative intent concurred, noting that the "reckless conduct" inherent in chasing "can threaten life and property." Moreover, the law authorized DCA to refuse to renew, suspend or revoke a towing license where the driver operated a truck in a "grossly negligent manner," made a material false statement on an application, engaged in fraud, failed to pay a fine, was convicted of a crime having a "direct relationship to the ability to perform the licensed activities," or engaged in conduct that would "endanger the public." *Id.* The legislative history reveals that the law was also motivated by economic factors, such as encouraging industry efficiency and eliminating the predatory prices charged by chasing towers. *Id.*

In 1993, the City stiffened enforcement of the Scheme by authorizing the seizure of unlicensed tow trucks. In passing Local Law 93-10, the City Council did not discuss safety concerns, noting instead that

strengthening enforcement would solve a "jurisdictional problem" posed by the number of towers failing to renew their licenses in addition to providing consumers with "timely, accurate . . . information regarding their rights." Report of the Committee on Consumer Affairs In Favor of Approving and Adopting, As Amended, a Local Law to Amend the Administrative Code of the City of New York In Relation to Increasing the Standards and Penalties for Participation in the Directed Accident Response Program and the Rotation Tow Program, New York City Local Law Bill Jacket, 1993 Local Law 10 (Dec. 17, 1992). Mayor David Dinkins stated that the bill is "designed to protect consumers by enhancing effective regulations of the tow industry." Remarks by Mayor David N. Dinkins, Public Hearing on Local Laws, New York City Local Law Bill Jacket, 1993 Local Law 10 (Jan. 22, 1993).

In 1994, the Scheme was amended again to broaden the definition of towing in N.Y.C. Admin. Code § 20-495(d) "to more clearly define what towing activity is and what vehicles will be considered tow trucks." Memorandum in Support from Frank T. New, Office of the Mayor, Director, City Legislative Affairs (Nov. 26, 1993). "Towing" was expanded to include all tow trucks without vehicles in tow as part of an effort to "fill[ ] existing loopholes which . . . undermine[d] the DARP program." *Id.*

Although the record is replete with evidence that the City sought to curb a public safety risk by carefully regulating tow trucks engaged in chasing, the legislative

history does nothing to explain whether the City Council intended to subject all tow trucks passing through the City to its Scheme or why such broad regulation was necessary.[4] The City may have been motivated by a desire to reduce chasing within New York City in broadening its definition of "towing," but it did not explain why increased enforcement was insufficient. Instead of enforcing existing law, the City chose to impose its Scheme on all tow trucks that happened to be within its limits, regardless of whether they were chasing. The legislative history is silent on how those trucks not engaged in chasing, or those merely driving through New York City threaten public safety and how the expanded definition of "towing" is genuinely responsive to those concerns.

2. *Assessment of Legislative Intent*

The second step of the *Loyal Tire* framework requires an assessment of the safety justifications in light of the record evidence. *Loyal Tire*, 445 F.3d at 145. The City argues that the regulations have helped reduce chasing, which has correspondingly improved public

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4. In fact, one of the DARP provisions seems to suggest that non-City towers might be outside the scope of the Scheme. The DARP rule states that the tower assigned to retrieve the disabled vehicle may not release the vehicle to another tower unless that tower is licensed by the City or "based outside of New York City and thereby is not required to be licensed pursuant to such provisions of the New York City Administrative Code." Rules of the City of N.Y. § 2-371.

safety.[5] However, the City has not presented any evidence to support this argument, relying exclusively on the Scheme's legislative history to demonstrate that the City Council and Mayor were motivated by a desire to make New York City safer. As noted by the district court, the City has never assessed the effectiveness of the Scheme in fighting chasing. Multiple amendments so soon after its enactment suggest that it was not strongly effective. In fact, the legislative history for the amendment expressly states that "[s]ince its enactment in 1987, DARP has been unable to eliminate the problem of 'chasing' that continues to plague the streets of the city of New York." Report of the Legal and Governmental Affairs Division, New York City Council Committee on Consumer Affairs (Dec. 10, 1993).

Even assuming that the Scheme has been effective in reducing chasing for accidents within New York City, the City has not articulated a reason as to why the

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5. The City also points to the Scheme's licensing and inspection requirements. Even though they are largely duplicative of New York State's inspection requirements, the City argues that the visible City license informs consumers what they are to be charged and to whom they may complain. Although this might serve an important consumer protection purpose, it is not genuinely responsive to safety concerns. Similarly, the City argues that the Scheme's criminal background checks of drivers are responsive to safety concerns. However, the legislative history is silent on the origins of the background checks, and at trial, the City suggested that the background checks were consumer protection measures because they sought to prevent towers from charging inflated prices.

Scheme must be enforced against all tow trucks anywhere within the City in order to reduce chasing, or how that broad enforcement is genuinely responsive to safety concerns. When a City resident's car breaks down in New Jersey, or Westchester, or Connecticut, the few trucks (if any) starting the "chase" from within the City would presumably already be licensed. Those starting and ending the chase outside of the City would not drive on City roads or highways or threaten City pedestrians. The tow truck returning the car to the City resident's repair shop within the City would not seriously jeopardize safety within New York City either. Although enforcement of the Scheme under these circumstances might serve to protect the City resident from high prices, that is not a safety concern. At that point, it becomes precisely the general industry regulation that Congress intended to preempt in enacting 49 U.S.C. § 14501(c).

No court has upheld a licensing scheme as restrictive as New York City's. One regulation upheld was a rotation requirement and accompanying solicitation ban not unlike the City's DARP program. *See Tow Operators Working to Protect Their Right to Operate v. City of Kansas City,* 338 F.3d 873, 876 (8th Cir.2003). On the other hand, an ordinance that, like the one at issue here, required a city license in order for a tow truck to operate on city streets has been invalidated because it did "not ensure that the towing and storage of motor vehicles will be performed safely." *See Northway Towing, Inc. v. City of Pasadena, Tex.*, 94 F.Supp.2d 801, 803 (S.D.Tex.2000), *abrogated on other grounds by Stucky*

*v. City of San Antonio*, 260 F.3d 424 (5th Cir.2001), abrogated by *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 122 S.Ct. 2226, 153 L.Ed.2d 430 (2002). The same is true of New York City's Scheme.

Enforcing the Scheme against tow trucks passing through New York City or towing vehicles into New York City does not respond to safety concerns and does not fall within the safety exception of 49 U.S.C. § 14501(c)(2)(A). Accordingly such enforcement, and the City's definition of "towing" in N.Y.C. Admin. Code § 20-495(d), are preempted by 49 U.S.C. § 14501(c)(1).

## II

We also hold that the district court's award of attorneys' fees and expenses was not an abuse of discretion. *See In re Holocaust Victim Assets Litig.*, 424 F.3d 150, 157 (2d Cir.2005). The City's argument that fees should be allocated on a claim-by-claim basis has been rejected by the Supreme Court, *see Hensley v. Eckerhart*, 461 U.S. 424, 435, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), and the cases cited by the City are inapposite. Finally, although a preemption claim under 49 U.S.C. § 14501(c) does not give rise to a federal right enforceable under § 1983, *see Loyal Tire*, 445 F.3d at 150, AAA's dormant Commerce Clause claim supports the district court's award of fees, *see Maher v. Gagne*, 448 U.S. 122, 132, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980) (section 1988 fees may be awarded where "the plaintiff prevails on a wholly statutory, non-civil-rights claim pendent to a substantial constitutional claim").

*Appendix A*

## CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

## APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MARCH 24, 2006

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

No. 04 Civ. 02576 (RO)

AUTOMOBILE CLUB OF NEW YORK, INC.

Plaintiff,

- against -

GRETCHEN DYKSTRA, as Commissioner of the Department of Consumer Affairs of the City of New York and the CITY OF NEW YORK,

Defendants.

**OPINION & ORDER**

OWEN, *District Judge*:

Following a hearing, this Court, in July 2004, granted a preliminary injunction maintaining a 19-year *status quo*. The opinion is reported at *Automobile Club of New York, Inc. v. Gretchen Dykstra*, 326 F.Supp.2d 568 (S.D.N.Y.2004),[1] familiarity with which is assumed

1. The record of that proceeding is before me now by stipulation of the parties. References to the transcripts are "1/" for the preliminary injunction hearing, and "2/" for the trial on the merits.

as it provides the extensive background herein, and following the denial of a stay in the Court of Appeals (*see* Appendix A, unreported, annexed), the merits of plaintiff Automobile Club of New York, Inc.'s action against the City of New York and its Department of Consumer Affairs (DCA), is now before me. I held a bench trial over three days in December 2004, where it was solidly established that towing has become enormously "nationalized." In the year 2003, plaintiff Automobile Club performed 14,000 interstate tows on behalf of its members, and other clubs in the New York area performed approximately 6,000 interstate tows in 2004 that involved New York City. Thus, the number of tows to adjoining states and within New York State which cross the border between the five boroughs of New York City and surrounding New York counties north and out to Long Island east is major,[2] as are requests of plaintiff Club by its members, merely requiring a crossing in and out of New York City, not to tow, but to give a jump start because of a dead battery or to change a flat tire, as to which entrances and exits had not been a problem until the DCA started seizures shortly before this suit began.

While over the years since 1987 there had been a few rare lapses by the DCA in honoring the informal reciprocal agreement which is extensively documented in my prior opinion, *see* 326 F.Supp.2d at 569-72, the

2. These include such tows as cars transported from Long Island or Westchester or Connecticut to Florida in the winter and back in the summers, and car "dealer swaps" from one state to another through New York City.

likely reason in my view that this problem had not explosively surfaced years earlier with a plethora of DCA seizures was the existence of that simple basic workable and honored oral agreement earlier well-evidenced in the correspondence over the years between senior officials of the DCA and those surrounding communities as well as stated the New York City police department's frequently published "Patrol Guide".[3] Thus, while a certain 1980's situation in New York City called "chasing" triggered *Ace Auto Body & Towing Ltd. v. City of New York*, 171 F.3d 765 (2d Cir.1999), and DARP and later ROTOW, *see infra*, and clearly called for strict control of New York City towers in its limited area, the inter-county and interstate commerce side effects created by aspects of that control were accommodated by the reciprocal agreement.

For starters, the federal Commerce Clause, Art. I, § 8, cl. 3 of the Constitution,[4] is unquestionably applicable to this situation, reserving to Congress the power to legislate in matters relating to interstate commerce. The "dormant" Commerce Clause as the law terms it is the "other-side-of-the-coin" limitation on the power of the states to enact laws imposing substantial burdens on interstate commerce. *See South-Central Timber Development Inc. v. Wunnicke*, 467 U.S. 82, 87, 104 S.Ct.

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3. This came to an end in early 2004, culminating in 21 seizures by the DCA on March 31, 2004, followed by the Court's TRO on April 5, 2004.

4. "The Congress shall have Power . . . To regulate commerce . . . among the several states. . . ."

2237, 81 L.Ed.2d 71 (1984). Also required where, as here, New York City's rules and ordinances impact interstate and intrastate commerce the same way—all *non*-New York City licensed tow trucks are treated the same; that is, they can be seized if they enter the City, whether from other states or other New York State counties—before the City's restraints can survive they must be shown to apply evenhandedly to effectuate a legitimate local public interest and that their effects on interstate commerce are only incidental. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). Phrasing in the reverse under *Pike*, New York City's Rules and legislation can *not* be sustained if "the burden imposed upon such commerce is clearly excessive in relation to the putative local benefits." *Id.*

For many years under the reciprocity agreement between the DCA and outside counties, and as straightforwardly stated in the police "patrol guide," there was little burden. Outsiders from upstate or Long Island or New Jersey or Connecticut—or wherever—essentially did no more than drive into the City on some major streets, drop a car off at a customer's city repair shop and go back out, or vice-versa, come in to some New York City garage holding some outsider's inoperable car and take it out to the customer's Westchester repair shop, or pass through from New Jersey to Long Island or Westchester on New York City major routes. Absent this permissiveness however, a New Jersey tower, wanting to tow from Newark to Mineola on Long Island, would have to go north of Yonkers on the west (opposite) side of the Hudson River

to the Tappan Zee Bridge, work across Westchester to Bridgeport, Connecticut to the Long Island Sound Ferry[5] and then on Long Island go back *west* to Mineola, perhaps more than doubling the distance at substantial time and expense.

Thus, in addition, New York City's licensing scheme, if allowed full flow, would create a major burden to the flow of interstate commerce by essentially imposing either a high toll on towers if they were to pay to be licensed to use its roads and highways[6] or a duplication

---

5. The Bridgeport, Connecticut Ferry is not regarded by towers as a practical alternative for towers based on Long Island to avoid the City's roads going from the Island to Westchester or New Jersey—or vice versa.

6. Any outside truck could of course be licensed, after perhaps a week or two's delay, and the fee is $600 per tow truck for two year license, and twenty dollars per driver. In addition, each company owner and driver must pay seventy-five ($75.00) dollars for a fingerprint report from the New York State Division of Criminal Justice Services. Other requirements include the placement of certain identifying information on the exterior of the truck and a review of any driver's record and criminal history (*see infra*). The towing equipment of each truck must be inspected at a City facility which requires a company to take the truck out of service for a period of time—thereby losing revenue. (The truck itself is inspected by the State of New York for road and worthiness).

The City's high fees are seen by neighboring jurisdictions as a toll, and while it does not figure in this opinion, there is some evidence that other surrounding counties might, depending on the outcome here, endeavor to enact and enforce a similar toll/exclusion or seizure structure making the area a shamble.

of towers, and expensive "handing-off" procedure between said two towers at New York City's county lines, which plaintiff did for several weeks before the Court's TRO—and which the City itself considered to be "inefficient." Otherwise, every tow truck legitimately licensed elsewhere which comes upon the City's roads or highways—whether towing, or picking up or dropping off a tow, or changing a tire, or simply driving a truck without a tow, perhaps to a City repair shop or perhaps passing through the City from Long Island to Westchester—is vulnerable to immediate seizure, *see* DCA's Deputy Commissioner's testimony, 326 F.Supp.2d at 571-72, and, if unable to afford a bond to release the truck, faces the loss of use of the truck for upwards of a week, awaiting an administrative hearing plus a possible substantial fine, and even forfeiture of the truck if the owner can not muster the fine.

But it is hardly too early here to note that, in line with the underlying principle of said reciprocity "agreement" and the police "Patrol Guide",[7] the Rules of the City of New York in force for years allows outsiders' entry and exit on New York City roads without threat of seizure in circumstances covered there. This is specifically stated in City Rule § 2-371 promulgated in 1994 and still in effect concerning the removal by the owner of a damaged vehicle towed to a City garage under the *Ace*-motivated Directed Accident

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7. Notwithstanding the City has contended to the Court at numerous times that the "Patrol Guide" did not state the law, *see, e.g.*, Tr. 1/179-83.

Response Program (DARP).[8] It takes a little spelling out, but under that program, as background, a DARP participant tow truck is empowered to remove a vehicle involved in New York City accident which cannot be safely driven under its own power to that DARP participant's garage in New York City. The Rule then specifically provides that DARP "[p]articipants must be open [virtually daily for] redemption of vehicles towed in the DARP Program," upon presentation of sufficient proof of ownership and payment of charges, and said disabled vehicle shall then be *"immediately released"*. The Rule finally expressly provides:

> "No participant shall release a vehicle to another towing company unless that towing company is licensed or otherwise exempt from the licensing provisions of subchapter 31 of chapter 2 of title 20 of the New York City Administrative Code, *or that towing company is based outside of New York City and thereby is not required to be licensed pursuant to such provisions of the New York City Administrative Code."* (emphasis supplied).

Since the place of "redemption" and "release" is the DARP participant's garage *within the City of New York*, obviously the language of the Rule above means that a towing company truck based outside New York City is entitled to lawfully enter the City, drive to the New York

8. Showing this language was no accident, it is repeated verbatim in a later section entitled The Rotation Tow Program (ROTOW) § 3-371.

City DARP garage and, on completion of the formalities, is authorized to tow the car across New York City streets to an adjacent county. Not to be repetitious, but this is exactly what the police department "Patrol Guide" has stated year after year—allowing licensed tow trucks from outside the City to come in and pick up a vehicle and take it out being exempt from seizure. *See supra.* I note that when the above DARP Rule and its obvious contradiction of the City's position was called to the Court's attention in an Amicus Brief after the preliminary injunction hearing, the City, without basis, contended at p. 2 of its Responding Memorandum, that this Rule and specifically § 2-371(w) requires a "DARP-participating tower" to tow such vehicle "to locations outside of New York City" before any turnover may be made to a non-City tow truck. Neither that section (quoted above) nor any part of the Rule says any such thing either as to DARP or ROTOW. Indeed, they state the contrary.

Next, the major DCA endeavor to justify and thereby utilize its legislation to exclude all others or seize them upon trespass is based on its assertion that its criminal background investigation of applicants to drive tow trucks in New York City serves a major safety function in that "it protects consumers of being the victims of a crime at the hands of tow truck drivers." *See City Post Trial Mem.* at 10.[9] Thus, the DCA requires

9. At Tr. 1/36, the City's counsel asserted the criminal background investigation as ". . . strictly a consumer protection issue about putting your car in the custody of someone you don't

(Cont'd)

all driver applicants for driving in New York City to submit fingerprints which are then sent to the New York State Division of Criminal Justice Services, which reports back on whether or not the applicant has a criminal record and what that record is. According to the DCA's testimony, 70 percent of those who apply have some criminal record. This is reviewed by the DCA's legal office pursuant to a protocol focusing mainly on the seriousness of the criminal history, its age(s), and whether the applicant lied to the DCA in the application. But the bottom line is that having done its review of the 70 percent that have a criminal record background, 6/7ths of that 70 percent are given licenses. Phrased differently, only 10 percent of all applicants are rejected for criminal background reasons although 70 percent have such and 60 percent are driving.

It would have been of assistance here to have made *some* study or report showing the efficacy of these criminal record reviews, but puzzlingly it appears that the DCA has never, at any time over the years since 1994, prepared any study or report of any kind as to whether or not this criminal inquiry has had any impact on the safety of consumers from tow truck drivers (or anybody else for that matter) nor has DCA ever communicated with any other jurisdiction (such as Huntington, which does the same thing, or neighboring

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(Cont'd)
know." Even defining this as a "safety" issue, it does not rise, certainly on this record, to justify the enormous burden on commerce, interstate or intrastate.

Yonkers) to see how they or New York is doing.[10] The testimony of DCA witness Alba Pico, a non-lawyer who has supervised this criminal conduct inquiry for the DCA since its beginning, gave the following forthright testimony, Tr. 2/237:

| | |
|---|---|
| THE COURT: | Have you, in the course of the years, spoken with—does Huntington do a criminal record stuff? I think they do, don't they? |
| THE WITNESS: | I don't know. I would not be aware. |
| THE COURT: | Have you ever asked them? |
| THE WITNESS: | No. |
| THE COURT: | Do you know whether Yonkers has ever considered doing this? Did you ever talk to anybody out there— |
| THE WITNESS: | No. |
| THE COURT: | —as to what their experience is? |

10. Perhaps this is because there is no evidence in this record of any plague of criminal conduct in *any jurisdiction anywhere* by tow truck drivers.

THE WITNESS: No.

THE COURT: You see, what I am trying to get at is, do you have any statistical backup here that because of your setup, you got less rapes and harassments and this and that per driver than any other major city in New York, Albany, Buffalo, Yonkers, you name it. Do you have anything that tells you that?

THE WITNESS: No.[11]

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11. Ms. Pico was asked on the trial by the City's lawyer—as to a number of these criminal records. Tr. 2/199:

> Q. I ask you to turn to the 11th rap sheet, license number ending 922. What do your records show about this person's application?
>
> A. The records show that the license was—*that the license was granted but this is after further review.* And this file, actually, I even had it on my desk. We had to ask the person for letters of reference. This person submitted a lot of letters from the reference and commendations, and *at the end the license ended up being approved.* (emphasis supplied).
>
> * * *

(Cont'd)

Given the totality of the foregoing, I am utterly unable to conclude that the fact that the City, however well motivated, checks criminal records, considers arrests as part of the record, and of every seven drivers with a criminal record refuses a license to one, has, over the years since 1994, had any measurable impact on the safety to any car owner or anyone else in New York City as compared with anywhere else in the state,[12] certainly not sufficient to justify prohibiting an out-of-city tower

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(Cont'd)

> Q. Why was he going to be denied?
>
> A. Based on the protocol and the review, the arrests were recent and related to the type of license that this person was seeking.
>
> Q. How were they related?
>
> A. Driving while intoxicated, possession of narcotics, possession of weapons, assault, possession of stolen property, credit cards, attempted burglary and possession of gambling records.
>
> Q. So based on your protocol, this person is being given the opportunity to show rehabilitation documents and now. . . .
>
> A. Yes.
>
> [The Court, given the above, queries what crosses DCA's "unsafe" line.]

12. I am told that insurance companies are becoming more active everywhere in doing their own checking to the probable benefit of this industry.

licensed by the State or any other state from entering the City to deliver or pick up a car or merely driving or towing through.[13] There must be a stronger showing than that of impact on safety to justify such marked interference with interstate and intrastate commerce affecting price, route or service under the Commerce Clause preemption 49 U.S.C. § 14501(a)(1). There is no reason why New York City (as does Huntington) may not continue, if it chooses, to utilize criminal records in making licensing decisions as to drivers applying to New York City-licensed towing companies. But where the City sees this as giving it collateral rights that "threaten[ ] to clog the avenues of commerce," because it "is not genuinely responsive to safety concerns . . ." it is preempted. *City of Columbus v. Ours Garage and Wrecker Service, Inc.*, 536 U.S. 424, 442, 122 S.Ct. 2226, 153 L.Ed.2d 430 (2002). Accordingly, the City of New York may not utilize this as a basis to prohibit legitimate tow trucks from elsewhere from entering New York City to pick up a tow or deliver a tow or drive through New York City (with or without a tow) between Long Island or New Jersey or Connecticut or Upstate New York, or seize such a truck if it so endeavors. Nor, as is dealt with immediately hereafter, can there be any exclusion or restriction by "definition" as to a tow truck *without* a tow at any time. *See infra.* Whatever else, it is just another truck.

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13. The hand-off at the City line between towers—not only conceded by the City to be an inefficient procedure—but as the Court sees it, puts an owner, man or woman, at risk at lonely hours of the night at the City line, and it is undisputed that any raising or lowering of a car in tow can from time to time cause it damage—so why double the risk?

Turning to this latter issue, the City asserts as integral to its position the revised definition of "towing" that DCA has obtained and presently stands in the New York City Administrative Code, *supra:* "'Towing" shall mean . . . the driving of a tow truck." On the basis of this, the DCA contends it can seize a truck without a tow, without probable cause as required by the U.S. Constitution's 4th and 14th Amendments, just on the DCA enforcement officer's "unproven"[14] conclusion

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14. *See* DCA's Deputy Commissioner's and Enforcement Director's testimony, both quoted at 326 F.Supp.2d at 571-72, the former stating that the law relieved "enforcement officers from having to try to prove that this industry wasn't lying every time you stopped them;" and the latter how enforcement officers therefore did not have to follow any truck without a tow for perhaps up to 2 1/2 hours to get *"proof."*

This is in the same area as *C.A.U.T.I.O.N., Ltd. v. City of New York,* 898 F.Supp. 1065 (S.D.N.Y.1995). There, the Court stated as to plaintiffs' allegations of a "policy and practice" by the City of the "arbitrary towing of vehicles." *Id.* at 1073:

> Unreasonable seizures by State actors are a subject of the Fourth Amendment, which is made applicable to the States by the Fourteenth Amendment
>
> * * *
>
> The complaint alleges that the practice [of arbitrary towing] complained of exists at the instance, or at least with the knowing acquiescence, of high City officials
>
> * * *

(Cont'd)

questioning a driver on the road that he was "lying" to him, *see* 326 F.Supp.2d at 571.[15] In this connection, I note that the New York State definition of commercial towing in the Vehicle and Traffic Law § 107-b is: "The moving or removing of disabled, illegally parked, or abandoned motor vehicles or motor vehicles involved in accidents, *by another motor vehicle,* for which there is direct or indirect compensation." (emphasis supplied). And of course, the common dictionary definition of towing is: "To drag or pull[ ] a car . . . by means of a device".[16]

While under Vehicle Traffic Law § 1642 Subsection 15, New York City has been given the power to

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(Cont'd)

> Hence, the contention that the City tows vehicles for alleged parking violations when in fact there is no basis for such charges *states a claim upon which relief may be granted.* (emphasis supplied).

The policy and practice here, *see* above, is essentially acknowledged by DCA's "major City officials." It is confirmed by a ranking City police officer as a desirable policy and practice. Tr. 1/465.

15. I note also the inappropriateness of this given another section of the New York City Administrative Code, § 20-522.1.b.: "Any police officer or authorized officer or employee of the department, upon service upon the owner or operator of a tow truck of a notice of violation . . . may seize a tow truck which such police officer or authorized officer or employee *has reasonable cause to believe* is being used in connection with such a violation." (emphasis supplied).

16. *The Random House College Dictionary,* 1980.

supersede state law in certain areas of "towing and pushing of vehicles" its power is specifically limited to enumerated areas such as insurance, licensing and regulating persons in the business, charges for and storage of disabled vehicles. New York City is not given the power to redefine "towing" as it has. Absent such authority, it has been held in the New York case *Sureway Towing, Inc. v. Martinez*, 8 A.D.3d 490, 779 N.Y.S.2d 109 (App.Div.2d 2004):

> Local governments may only exercise those powers expressly granted to them by the State Constitution or the Legislature (*see Sand Hill Assoc. v. Legislature of County of Suffolk*, 225 A.D.2d 681, 640 N.Y.S.2d 128; *New York State Pub. Empls. Fedn., AFL-CIO v. City of Albany*, 72 N.Y.2d 96, 527 N.E.2d 253, 531 N.Y.S.2d 770 (1988)). Further, Vehicle and Traffic Law § 1600 provides that the provisions of this chapter shall be applicable and uniform throughout this state and in all political subdivisions and municipalities therein[,] and no local authority shall enact or enforce any local law, ordinance, order, rule or regulation in conflict with the provisions of this chapter unless expressly authority herein.

The *Sureway* opinion continues that if what the "local authority" purports to do ". . . is not one of the enumerated subjects that may be superseded by local law (*see* Vehicle and Traffic Law § 1642), . . . the State law found in Vehicle and Traffic law [§ 107-b] remains applicable here."

Consequently, as *Sureway* observed, New York State law defining towing (§ 107-b, *supra*) was not and could not be superseded by "local law" and therefore that local definition is void, and "[a] truck is just a truck," immune from seizure when Constitutional requirements are not met.

Accordingly, given all the foregoing, this Court concludes that seizure by a City agency of any outsider tow truck in New York City is prohibited where the only ground the agency reasonably has and can assert for the seizure is that the tow truck is not licensed by the City of New York. All tow trucks lawfully operating, with or without a tow, from anywhere outside New York City, whether based within the State or elsewhere, are to be permitted the same access to and use of New York City's roads as those towers licensed by New York City. Plaintiff Automobile Club is awarded compensatory damages against the City of New York in the amount of $17,500, together with prejudgment interest from March 31, 2004, based on the total costs of double-tows (the so-called "handing-off" procedure discussed *supra*), out-of-territory service fees and overtime services necessary for plaintiff to continue to provide quality roadside assistance and towing services to its members during the period in which the City's seizures were taking place. *See* Tr. 2/14-20, 114-16; *see DiSorbo v. Hoy*, 343 F.3d 172, 182 (2d Cir.2003); *Goldberg v. Town of Rocky Hill*, 973 F.2d 70, 72-75 (2d Cir.1992); and *Monell v. Dep't of Social Services of City of New York*, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). While there was objection by DCA to any basis for damages at

all, there was no objection to the items of cost asserted as damages and their claimed bases, or to the manner by which the damages were calculated. A municipality can be held liable for compensatory damages "when execution of [its] policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983," when the official policy is "the moving force of the constitutional violation." *Monell*, 436 U.S. at 694, 98 S.Ct. 2018.

Attorneys' fees are hereby awarded to the plaintiff under 42 U.S.C. § 1988(b), which is to serve and submit a sworn statement detailing same within ten days. Should defendants take issue with any aspect thereof, they are to notify the Court within ten days thereafter, and a hearing will then be scheduled to resolve any such issues.

Plaintiff seeks to have Title 20, Chapter 2, Subchapter 31 of the New York City Administrative Code declared unlawful and invalid; and to permanently enjoin the City and DCA from enforcing it. Some of the provisions contained therein appear to be required and appropriate under *Ace*. A hearing is hereby set for Thursday, April 13, 2006 at 10 o'clock in the morning, in Courtroom 1106 of the United States Courthouse, 40 Foley Square, to determine which sections survive and which do not.

*Appendix B*

New York City Administrative Code, Title 20, Chapter 2, Subchapter 31, § 20-495(d), defining "towing," is, however, separately declared void.

The foregoing constitutes the Court's findings of fact and conclusions of law, and is so ordered.

Dated: New York, NY
March 24, 2006

s/ R. Owen
United States District Judge

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FILED
1-23-08

(2)

No. 07-1593

# In the Supreme Court of the United States

GRETCHEN DYKSTRA, COMMISSIONER, DEPARTMENT OF CONSUMER AFFAIRS OF THE CITY OF NEW YORK, et al.,
*Petitioners*,

v.

AUTOMOBILE CLUB OF NEW YORK, INC.,
*Respondent*.

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

I. Whether a compelling reason exists to grant the petition, where the Second Circuit's analysis of Petitioners' highly restrictive towing scheme was addressed at determining whether the scheme was "genuinely responsive to safety" and where the legal standard applied does not conflict with a decision of this Court or of any other circuit.

II. Whether review by this Court would be futile where Respondent's claim of direct injury under the Commerce Clause provides a viable alternative to its claim of preemption.

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## PRELIMINARY STATEMENT

Petitioners fail to present this Court with a "compelling reason" to support an exercise of jurisdiction. *See*, Sup. Ct. R. 10. Rather, they engage in a clever linguistic exercise to argue that the Second Circuit subtly but significantly altered this Court's holding in *City of Columbus v. Ours Garage and Wrecker Service*, 536 U.S. 424 (2002) to improperly require proof of efficacy. The Second Circuit required no such proof. The Second Circuit simply noted the dearth of evidence introduced by Petitioners to support their argument that the challenged portions of the scheme had actually been effective in promoting safety. Pet. App., 12a-13a[1] ("The City argues that the regulations have helped reduce chasing, which has correspondingly improved public safety.").

Even with their contrived and inaccurate analysis of the legal standard applied by the Second Circuit, Petitioners are still forced to parse the caselaw to create the impression that a split of authority exists. It takes little effort, however, to realize that the circuits have all uniformly applied the *Ours Garage* standard. In all of the cases relied upon in the petition, the circuits looked beyond mere statements of intent in the legislative history and focused on identifying a nexus between the challenged regulations and the stated legislative purpose. Since, this approach is congruent with the standard applied in

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[1] "Pet. App. __" refers to the Appendix to Petitioner's Petition for a Writ of Certiorari.

this case, there is no conflict worthy of this Court's review.

In addition to the fact that no genuine conflict exists, granting the petition would be futile. Petitioners concede that the Second Circuit declined to reach an opinion of Respondent's claim of injury arising under the Commerce Clause. Petitioners mischaracterize the basis for the claim, which is unquestionably still viable and would provide an alternate basis for the decision below.

## STATEMENT OF THE CASE

In enacting the Federal Aviation Authorization Act of 1994 (the "FAAA Act"), Congress preempted regulation of motor carriers, including tow trucks, "...related to a price, route, or service of any motor carrier ... with respect to the transportation of property. 49 U.S.C. §14501(c).[2] As an exception to this general rule, however, the FAAA Act saved from preemption those laws passed pursuant to a State's "safety regulatory authority." 49 U.S.C. §14501(c)(2)(A). In 2002, this Court held that only those laws that are "genuinely responsive to safety concerns" are saved from preemption." *Ours Garage*, 536 U.S. at 442.

In a case decided prior to *Ours Garage*, the Second Circuit held that the FAAA Act's safety exception saves laws "reasonably related" to safety. *Ace Auto*

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[2] Petitioners concede that the portions of its scheme at issue fall within the scope of regulations preempted by the FAAA Act.

*Body & Towing, Ltd. v. City of New York*, 171 F.3d 765, 777 (2d Cir. 1999). Recognizing that this Court's decision in *Ours Garage* represented a stricter standard than was set forth in *Ace Auto Body*, the Second Circuit altered its approach in *Loyal Tire & Auto Center v. Town of Woodbury*, 445 F.3d 136, 145 (2d Cir. 2006).

Following *Ours Garage*, the Second Circuit applies a two part test to decide whether a regulation is genuinely responsive to safety. First, the Second Circuit looks to the legislative history for any "specific expressions of legislative intent" which is then followed by an assessment of the safety justifications asserted "in light of the existing record evidence." *Loyal Tire*, 445 F.3d at 145. The Second Circuit applied this two part test to the instant case and held that Petitioners failed both steps. Pet. App., 9a.

Petitioners seek to vindicate a multi-faceted regulatory scheme that controls many aspects of the towing business. Of particular importance, the scheme contains an extraordinarily broad definition of towing that requires all tow trucks within the City of New York to first obtain a license or else risk seizure. Pet. App., 3a. The broad definition of towing did not comprise part of the original enactment of the regulatory scheme but was contained in later amendments that sought to strengthen the initial regulations. Pet. App., 11a.

Notwithstanding this broad definition of towing, both courts below found that from 1987 until 2004, the Petitioners had a policy of non-enforcement of the regulatory definition of towing. Pet. App., 4a-6a. This

policy led to minimal enforcement of the scheme – particularly the seizure of unlicensed non-City tow trucks. Pet. App., 4a. The abrupt termination of this policy led to a rash of seizures and the commencement of this action.

Applying the two part test of *Loyal Tire*, the Second Circuit held that Petitioners failed – on both parts – to meet their burden of proof that the challenged regulations were "genuinely responsive to safety." First, the Second Circuit reviewed the legislative history in search of specific findings or statements of intent explaining the rationale and purpose behind the broad definition of towing designed to restrict out-of-City tow trucks. The Second Circuit recognized that the primary impetus behind the regulatory scheme was to address the problem of chasing[3], but further held that the scheme "was also motivated by economic factors, such as encouraging industry efficiency and eliminating the predatory prices charged by chasing towers." Pet. App., 10a. Notwithstanding this general statement of intent, the court below noted that the legislative history did not explain how the expanded definition of towing would work to deter chasing.[4]

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[3] Chasing involves tow trucks monitoring police transmissions to learn of accidents and then racing to the scene in search of lucrative body work.

[4] This aspect of the test was of critical importance to the lower court. At oral argument below, the panel noted its difficulty in locating any legislative history surrounding the amendments to the regulatory scheme that resulted in the expanded definition of towing and provided the Petitioners with the opportunity to submit post-argument evidence regarding the legislative history

Pet.App., 12a. ("The legislative history is silent on how those trucks not engaged in chasing, or those merely driving through New York City threaten public safety and how the expanded definition of 'towing' is genuinely responsive to those concerns."). Ultimately, the Second Circuit correctly concluded that the legislative history failed to establish that the regulations were genuinely responsive to safety because they could not justify the broad definition of towing. Pet.App., 13a-14a. (Petitioners failed to "articulate a reason as to why the Scheme must be enforced against all tow trucks anywhere within the City in order to reduce chasing, or how that broad enforcement is genuinely responsive to safety concerns.")[5]

Turning to the second part of the *Loyal Tire* test, the Second Circuit first considered Petitioners' argument that the regulatory scheme as a whole has served to reduce chasing and improve public safety. Pet.App., 12a-13a. ("The City argues that the regulations have helped reduce chasing, which has correspondingly improved public safety."). Assessing

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to the scheme. Petitioners did submit additional papers as to the legislative history, which the court below considered in reaching its opinion.

[5] The true motivation behind the expanded definition was succinctly explained at trial by the Deputy Commissioner of Consumer Affairs who testified that the purpose was to relieve enforcement officers of the burden "'to prove that this industry wasn't lying every time you stopped them.'" *Automobile Club of New York, Inc. v. Dykstra*, 326 F. Supp. 2d 568, 571 (S.D.N.Y. 2004).

this argument in the context of the record evidence in the District Court, the Second Circuit recognized the complete failure of Petitioners to introduce any evidence to support their claim of effectiveness. Pet. App., 13a. The Second Circuit did not end its inquiry here. To the contrary, the Second Circuit accepted the unsubstantiated assertion by Petitioners that it furthered safety and analyzed the relationship of the expanded definition of towing to the safety justification asserted. Pet.App., 13a. As to this, the Second Circuit rightly held that Petitioners failed to articulate "a reason as to why the Scheme must be enforced against all tow trucks anywhere within the City in order to reduce chasing, or how that broad enforcement is genuinely responsive to safety concerns." Pet.App., 13a-14a.

## REASONS FOR DENYING THE PETITION

### *I. NO GENUINE CONFLICT EXISTS AMONG THE CIRCUITS.*

We agree with Petitioners that this Court acted purposefully in creating the standard in *Ours Garage*. The Second Circuit properly applied *Ours Garage* to the facts of this case and found that Petitioners failed to meet their burden of proof. Since this Court has no interest in reviewing Petitioners' quarrel with the fact finding in the lower courts, it is necessary for them to manufacture a split among the circuits. *See*, Sup. Ct. R. 10.

Petitioners fail to appreciate the holding of *Ours Garage*. By focusing their clever argument on only one discrete component of the "genuinely responsive to

safety" standard – the word "responsive," they completely ignore the importance of the word "genuinely." Worse, Petitioners really seek a standard that would allow the use of "safety" as a pretext for economic and other regulation – precisely what the FAAA Act sought to eliminate. Clearly, this will not address the "patchwork of regulation" that Congress sought to address in the FAAA Act. H.R. Conf. Rep. 103-677, 1994 U.S.C.C.A.N. 1715, 1994 WL 440339, *87. And it certainly does not reflect the *Ours Garage* standard.

The proposed standard would severely limit inquiry solely to the language contained in the legislative history. Pressing the point further, Petitioners argue that mere conclusory safety justifications are sufficient to avoid preemption. No circuit court supports this approach and indeed, the Ninth Circuit fundamentally disagrees. *Tillison v. City of San Diego*, 406 F.3d 1126, 1130 (9th Cir. 2005) (a legislature's "expression of intent and purpose" is not dispositive to the question of whether the safety exception applies to preempted regulations).

The distinction in the caselaw is factual, not legal. Although true that the above-cited cases all affirmed the validity of the challenged regulations, it is similarly true, as the Second Circuit observed, that "no court has upheld a licensing scheme as restrictive" as the one advanced by Petitioners here. Pet. App., 14a.

Here, the sweeping impact of the scheme went well beyond the targeted measures in the cases cited above. Under the scheme, any tow truck present within the borders of the City of New York, even if it is not within

the City to engage in chasing, could be seized without a license. Indeed, any tow truck entering the City – even if it had no intention of providing any towing services – risked seizure.[6] The propriety of such an expansive scheme had not been addressed by any circuit prior to this case.

Virtually all of the cases relied upon by Petitioners concern narrowly drawn regulations aimed at a similar purpose. Setting aside the obvious factual differences, the legal standard applied is virtually indistinguishable. In every case cited by Petitioners, the circuit courts looked beyond mere conclusory statements of legislative intent. The caselaw is replete with interest and concern in contemporaneous evidence explaining how the challenged regulations genuinely respond to safety.

First, in *Galactic Towing, Inc. v. City of Miami Beach*, 341 F.3d 1249 (11th Cir. 2003), the Eleventh Circuit assessed the propriety of regulations narrowly tailored toward towers who sought to engage in non-consensual towing of unauthorized vehicles from private parking lots without the permission of the vehicle owner. *See*, *Galactic Towing, Inc. v. City of Miami Beach*, 274 F. Supp. 2d 1315, 1316 (S.D. Fla. 2002). The Eleventh Circuit, however, did not simply rely upon the assertion of the legislature that it intended the regulations to be safety related –

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[6] This includes Long Island based tow trucks needing to pass through the City to access other states, such as New Jersey, Connecticut, and Pennsylvania, as well as tow trucks dispatched by Respondents to fix a flat tire or revive a dead battery.

although the legislative history amply stated the intent and purpose of and provided a rationale and support for the challenged regulations. *Id.* Rather, the court considered evidence proffered by the City of Miami Beach on how the challenged provisions impact the safety concerns in the legislative history. *Galactic Towing*, 341 F.3d at 1253. (City offered affidavits that showed "how the challenged sections of the City's vehicle towing ordinance affect *safety concerns*") (emphasis in original).[7]

Similarly, in *VRC, LLC v. City of Dallas*, 460 F.3d 607 (5th Cir. 2006), the Fifth Circuit considered a narrow challenge to regulations aimed at regulating "non-consent towing services from private property in Dallas, Texas." *Id.* at 608. In defense, the City of Dallas introduced evidence to show the intended effect of the regulations in support of its clear legislative purpose. *Id.* at 615 (citing testimony of a city administrator of his experience with "confrontations between citizens and tow truck drivers and that the signs had been helpful").[8] The Fifth Circuit relied

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[7] The Eleventh Circuit cites to *Cole v. City of Dallas*, 314 F.3d 730 (5th Cir. 2002), a case relied upon by Petitioners, in its analysis of *Galactic Towing*. However, *Cole* has no application to the proper interpretation of *Ours Garage*. In *Cole*, the Fifth Circuit held that *Ours Garage* provides no standard to determine the scope of safety regulations permissible under 49 U.S.C. §14501(c)(2)(A). *Id.* at 733. Absent this guidance, the Fifth Circuit relied upon pre-*Ours Garage* cases, including *Ace Auto Body* in creating a standard of analysis. *Id.* at 734.

[8] Although the *VRC* Court purports to distinguish *Loyal Tire*, the instant case leaves no doubt that the Fifth Circuit incorrectly read

upon both a specific statement of legislative intent and the city administrator's testimony explaining the intended impact of the regulations in furtherance of the legislative intent and reasonably found them genuinely responsive to safety. *Id.* ("Logically, the signs could prevent drivers from parking where they were at risk of being towed, help to defuse the anger of some who actually were towed, and ... reduce the drain on police resources caused by false stolen car reports.").

The decision in *VRC*, much like the case at hand, evinces a concern beyond mere conclusory allegations of legislative intent. Perhaps recognizing this, Petitioners deride the evidence considered as "conclusory." The fact is that Petitioners failed to proffer any evidence conclusory or otherwise. Given the stark difference in the two factual records, it is sheer speculation to suggest that the Second Circuit would have reached a different result on the facts in *VRC*.

Third, the Ninth Circuit in *Tillison* also looked at a challenge to a regulation limited to removing unauthorized vehicles from private parking lots without the consent of the vehicle owner. Relying primarily on cases such as *Galactic Towing* to uphold the limited regulation, the Ninth Circuit indicated a concern with how the regulation related to the specific safety purpose advanced. *Tillison*, 406 F.3d at 1130-31 (quoting, *Galactic Towing*, 274 F. Supp. 2d at 1319, n.

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the holding of *Loyal Tire*. Moreover, application of the *Loyal Tire* test to the facts in *VRC* would yield the same result.

1)(discussing evidence of how the provision is genuinely responsive to safety).

*Tillison v. Gregoire*, 424 F.3d 1093, (9th Cir. 2005) similarly provides no support for Petitioners. *Gregoire*, like the four cases cited above, also concerned narrow regulations directed to the non-consensual removal of vehicles from parking lots. No factual record was necessary in *Gregoire* since the plaintiff conceded that the regulations addressed a safety issue. *Id.* at 1103. Notwithstanding this concession, the Ninth Circuit nonetheless analyzed the proffered safety benefit of the regulations at length before upholding their validity. *Id.* at 1104.

For different reasons, *Tow Operators Working to Protect Their Right to Operate on the Streets of Kansas City v. City of Kansas City*, 338 F.3d 873 (8th Cir. 2003) also has no application to the case at bar. Critically, the plaintiffs failed to meet their initial burden to show that the regulations were subject to preemption under 49 U.S.C. §14501. *Id.* at 876. Thus, the Eighth Circuit need not have considered whether the regulations were genuinely responsive to safety. In any event, as in *Gregoire*, plaintiffs in *Tow Operators* conceded that the regulations were genuinely responsive to safety. *Id.*

No genuine conflict exists among the circuits. First, there is a common legal standard that pervades all of the post-*Ours Garage* cases. Similar to the approach of the Second Circuit here, each of the cases cited by Petitioners manifests an interest in and a concern for evidence beyond the safety justifications found in the legislative history. Second, all but one of

the cases relied upon by Petitioners dealt with narrowly drawn regulations focused to an identical agenda. By contrast, this case concerned 1) a different legislative concern and a broader set of regulations addressed to that concern; and 2) a demonstrably sparer factual record. Petitioners casually argue that none of the regulations considered by the other circuits would survive the Second Circuit test, but that argument is wholly speculative in light of the available evidence in those cases and Petitioners' failure to advance any evidence in this case.

## *II. GRANTING THE WRIT WOULD BE FUTILE*

### A. Respondent has a viable claim under the Commerce Clause.

Granting this petition will have no practical effect on the case since Respondent will retain a viable claim for direct injury arising under the Commerce Clause. Petitioners correctly note that the Second Circuit did not opine upon that part of the District Court's decision that found that Petitioners scheme failed this Court's balancing test in *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970). Petitioners attempt to elide this viable claim by misstating the basis for standing.

Respondent has never sought to assert representational standing. Rather, the Commerce Clause challenge was based upon direct injury occasioned by the Petitioners' abrupt change of policy, which resulted in full enforcement of the licensing scheme, including seizure, of any tow trucks within the borders of the City. As the District Court held, this had a direct impact on the ability of Respondent to

fulfill its core mission, in addition to the impact it had on interstate towing at large. Further, the Second Circuit affirmed the District Court's award of attorneys' fees under 42 U.S.C. §1983 on the strength of the substantial Commerce Clause claim advanced by Respondent. Pet.App., 15a ("AAA's dormant Commerce Clause claim supports the district court's award of fees")(citation omitted).

## CONCLUSION

Having failed to present this Court with any "compelling reason" as set forth in this Court's Rules, the petition should be denied.

Respectfully Submitted,

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